

## § 779.386

### RESTAURANTS AND ESTABLISHMENTS PROVIDING FOOD AND BEVERAGE SERVICE

#### **§ 779.386 Restaurants may qualify as exempt 13(a)(2) establishments.**

(a) A restaurant may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act. However, the establishment must meet all of the requirements of section 13(a)(2) (see § 779.337). It should be noted that a separate exemption from the overtime pay provisions of the Act only is provided in section 13(b)(18) for certain food service employees employed by establishments other than restaurants if the establishment meets the definition of a retail or service establishment as defined in the last sentence of section 13(a)(2). Privately owned and operated restaurants conducted as separate and independent business establishments in industrial plants, office buildings, government installations, hospitals, or colleges, such as were involved in *McComb v. Factory Stores*, 81 F. Supp. 403 (N.D. Ohio) continue to be exempt under section 13(a)(2) where the tests of the exemption are met (S. Rept. 145, 87th Cong., first session, p. 28; H. Rept. 75, 87th Cong., first session, p. 10). However, they would not be met if the food service is carried on as an activity of the larger, nonretail establishment in which the facility is located and there is no independent, separate and distinct place of business offering the restaurant service to individual customers from the general public, who purchase the meals selected by them directly from the establishment which serves them. An establishment serving meals to individuals, pursuant to a contract with an organization or person paying for such meals because the latter has assumed a contractual obligation to furnish them to the individuals concerned, is selling to such organization or firm, and the sales are for resale within the meaning of section 13(a)(2). See also § 779.387.

#### **§ 779.387 “Restaurant” exemption under section 13(b) (8).**

(a) As amended in 1966, the Act, in section 13(b) (8), exempts from its overtime pay provisions “any employee employed by an establishment which is

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a \* \* \* restaurant”. The term *restaurant* as used in section 13(b)(8) of the Act means an establishment which is primarily engaged in selling and serving to purchasers at retail prepared food and beverages for immediate consumption on the premises. This includes such establishments commonly known as lunch counters, refreshment stands, cafes, cafeterias, coffee shops, diners, dining rooms, lunch rooms, or tea rooms. The term “restaurant” does not include drinking establishments, such as bars or cocktail lounges, whose sales of alcoholic beverages exceed the receipts from sales of prepared foods and nonalcoholic beverages. Certain food or beverage service employees of establishments such as bars and cocktail lounges, however, may be exempt under section 13(b)(18).

(b) Not all places where food is served for immediate consumption on the premises are “restaurant” establishments within the meaning of section 13(b)(8). Such service is sometimes provided as an incidental activity of an establishment of another kind, rather than by an establishment possessing the physical and functional characteristics of a separate place of business engaged in restaurant operations. In such event, the establishment providing the meal service is not an establishment “which is” a restaurant as section 13(b)(8) requires for exemption. Further, not every place which serves meals, even if it should qualify as a separate food service establishment, possesses the characteristics of a “restaurant.” The meals served by restaurants are characteristically priced, offered, ordered, and served for consumption by and paid for by the customer on an individual meal basis. A restaurant functions principally, and not merely incidentally, to meet the immediate needs and desires of the individual customer for refreshment at the particular time that he visits the establishment for the purpose. A separate transaction to accommodate these needs and desires takes place on the occasion of each such visit. A “restaurant”, therefore, is to be distinguished from an establishment offering meal service on a boarding or term basis or providing such service only as